

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1409

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BLAIR WATSON,

Appellant.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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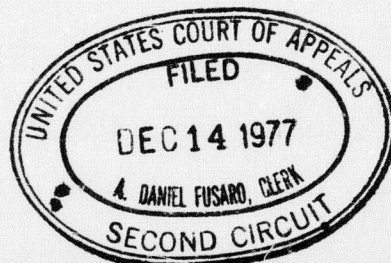


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No.

77-1409

BLAIR WATSON,

Appellant.

-----X

BRIEF FOR APPELLANT
BLAIR WATSON

Blair Watson appeals from his conviction of June 30, 1977, in the United States District Court for the Eastern District of New York (Platt, J.) upon a jury verdict of Bank Robbery, 18 U.S.C. 2113(a)(4), 2.

Judge Platt sentenced the appellant to a term of twenty (20) years imprisonment.

At the trial the Government's proof consisted of identification testimony by three bank employees, and it is the fairness and validity of the identification procedure used for one of these witnesses that is the principal issue on this appeal.

ISSUES PRESENTED FOR REVIEW

The appeal presents two major issues. These are:

1. Whether the Constitutional rights of the appellant were violated by a lineup held during the trial in which the defense attorney was not allowed by the Government to be in the same room as the identifying witness at the time that said witness viewed the lineup?

2. Whether the district court committed error in failing to suppress the in-court identification by the witness who participated in the unconstitutional lineup, and who lacked a sufficient independent basis for making the in-court identification?

STATEMENT OF THE CASE

On February 22, 1977, three men committed a bank robbery in Queens, New York. One of the robbers, later alleged to be the appellant, wielded a sawed-off shotgun and appeared to be the ring-leader of the group.

Three months later, on the basis of two photo lineups viewed by two employees of the bank, the appellant was arrested and charged with participating in the bank robbery.

The trial began on June 28, 1977, and the Government called three bank employees as eyewitnesses in support of the indictment.

NURIT RESHEF testified that she was employed as a bank teller, and that she was the particular victim of the robbery. She described the shotgun-bearing robber as a colored man, thin in stature, who wore glasses, and whose skin color was so light that she could not tell whether he was Hispanic or Black. (T.6/28, p. 44). His clothing included a turtleneck sweater and a long overcoat. (T.6/28, p. 45).

During the course of the robbery, Ms. Reshef was able to see the face of the robber, until he forced her to remove her glasses, at which time her vision "wasn't good". (T.6/28, p. 59).

Ms. Reshef further testified that in May, 1977, Government agents displayed six (6) photos to her and told her to pick out the one who most resembled the man

who committed the bank robbery. She could not positively identify the robber from viewing the photographs, and told the Government agent: "I cannot swear whether this person (the appellant) is the robber but from all the photographs he has a close resemblance." (T.6/28, p. 48).

When asked at the trial by the prosecutor whether she saw the robber in court, this witness stated that the appellant "resembles" the robber. (T.6/28, p. 50).

ALFRED DI FRANCESCA testified that he was employed as an assistant at the bank, and that during the course of the robbery he was able to observe the robber's face, and was positive that the appellant was the person who robbed the bank.

Mr. Di Francesca described the robber as a very light skinned Black man who wore a navy blue turtleneck sweater. (T.6/28, p. 82-83).

However, Mr. Di Francesca, contrary to the prior witness, did not recall that the bank robber wore glasses, nor did he recall that the robber wore a long overcoat. (T.6/28, p. 124).

Mr. Di Francesca testified that he had previously identified the bank robber both from a photo lineup and from an in-person lineup. (T.6/28, p. 126).

At the close of Mr. Di Francesca's testimony, the prosecutor informed Judge Platt that another witness was

flying in from Los Angeles, California, that said witness, LAURA TRIA, had not viewed either a photo or an in-person lineup, and the prosecutor requested that the Court order the appellant to participate in a lineup.

Judge Platt then ordered that a lineup be held in the basement of the Courthouse, over the objection of the defense attorney, and that a "mini-Wade hearing" would be held outside the presence of the jury after the lineup had taken place. (T.6/28, p. 136).

After the lineup took place, defense counsel objected to the nature and participants in the lineup, and requested that all persons who participated with appellant in the lineup be displayed to the jury. (T.6/29, pp. 2, 8).

The Court granted counsel's motion, and all of the participants in the lineup were displayed to the jury. (T.6/29, pp. 18-20).

The defense attorney further objected to the conduct of the lineup, in that although he was allowed to participate to the extent of telling the appellant where to stand and being able to view/^{the}appearance of the other participants in the lineup, he was prohibited by the prosecutor from being in the same room as the eyewitness at the time that she viewed the lineup and reacted to it. The witness, along with the prosecutor and Treasury agent, were in a room separate and apart from the room in which were the defense attorney and the subjects of the lineup, and thus the attorney was not

allowed to hear what was said to the witness preparatory to the lineup, nor could he hear or see the reaction of the witness to the viewing of the lineup. (T.6/29, pp. 8-13).

Although the Court had promised that a "mini-Wade hearing" would be held prior to the witness' testifying at the trial, no such hearing was held and the defense attorney was not permitted to inquire whether in fact the lineup might have been tainted by suggestive comments to the witness by either the prosecutor or the Treasury agent before or during the viewing of the lineup by the witness.

LAURA TRIA testified that she was a teller at the bank on the day that it was robbed, approximately four (4) months previously. (T.6/29, p. 20).

She stated that she was only able to view the robber's face for about six or seven seconds before the robber forced the bank tellers to lie on the ground. (T.6/29, p. 27).

She described the robber as wearing an off-white turtle neck sweater (contrary to the other two witnesses), was unable to remember any other article of clothing that the robber wore, and did not remember whether or not the robber wore glasses. (T.6/29, pp. 28, 50-51).

Although Ms. Tria made a positive in-court identification of the appellant as the one who robbed the bank (T.6/29, pp. 31-32), she admitted that when she viewed the in-person lineup, she was not sure of the

identity of the robber, and it was necessary for her to inspect a picture of the lineup before she made her decision that the appellant was in fact the one whom had robbed the bank. (T.6/29, pp. 40, 58).

The only witness that the defense called at the trial was the Treasury agent who arrested the appellant, and his testimony was limited to the circumstances of the arrest, and the fact that no contraband or other evidence was seized from the appellant at the time of the arrest.

The jury convicted the appellant of Bank Robbery, and he was sentenced to a prison term of twenty (20) years.

ARGUMENT

POINT I

APPELLANT'S SIXTH AMENDMENT RIGHT
TO ASSISTANCE OF COUNSEL WAS VIOLATED
BY THE REFUSAL OF THE GOVERNMENT TO
ALLOW THE DEFENSE ATTORNEY TO BE
PRESENT DURING THE ENTIRE LINEUP.

There can be no doubt that the Sixth Amendment to the United States Constitution requires the presence of defense counsel at a post-indictment in-person lineup. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

Wade, supra, makes clear that an accused's most basic right is his right to a fair trial at which the witnesses against him might be meaningfully cross-examined. To insure a fair trial, the presence of defense counsel is necessary not only in the courtroom, but at other times as well: "In addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." Wade, supra, at 226.

Courts have long disputed the question of exactly when in the course of a criminal proceeding the right to counsel attaches, but it is clear that an accused has a right to have counsel present during a lineup held in the

middle of a trial, and the denial of that right is a per se violation of the Sixth Amendment. Kirby v. Illinois, 406 U.S. 682 (1972).

Not all post-indictment identification procedures require the presence of defense counsel. For example, the Sixth Amendment does not mandate the presence of counsel at a photo lineup, in which the witness is requested to look at various photographs in an attempt to identify the perpetrator of a crime. United States v. Ash, 413 U.S. 300 (1973). This Court has held that the presence of defense counsel is only required at a proceeding where the accused is present, and not at a proceeding, such as a photo lineup, where the accused is not personally present. United States v. Bennett, 409 F.2d 888 (2nd Cir. 1969). However, the law is clear that in a proceeding such as the instant one, defense counsel has an absolute right to be present at the lineup.

The obvious purpose of a defense attorney being present at a lineup is to help insure that the lineup is conducted in a fair manner. Experience has shown that once an identification has been made at a lineup, the same person will also be identified in court. Therefore, the fairness of the lineup is crucial to the accused's receiving a fair trial.

The function of defense counsel at a lineup is not to just stand there and hope that his client is not identified by the witness or witnesses. The attorney's role, besides merely observing the proceeding, is to take affirmative

steps to insure that the lineup is conducted fairly and without taint or suggestiveness.

He can see to it that the persons in the lineup are wearing similar clothing, and that there are not five black men and one white man in the lineup, or five elderly men and one teenager. He can make sure that his client is not viewed by the witness or witnesses before the lineup actually begins, and he can request that the witnesses be prevented from conversing with each other during the course of the lineup.

Also, and just as importantly, the defense attorney can make sure that the police or prosecutor make no suggestive comments to the witness or witnesses. He can hear if the policeman tells the witness: "One of these men is the man who robbed you. Please pick out the one who robbed you." He can be present to see if the witness is unsure, and is asked by the police to "look at number three again".

In the instant case, defense counsel was prohibited from being in the same room as the witness, the police, and the prosecutor at the time that the witness was told what was about to occur, at the time the witness viewed the lineup, at the time the witness reacted to the viewing of the lineup, and at the time that possibly suggestive comments were made to the witness by the police or prosecutor.

In so restricting the defense attorney, the appellant's

right to the assistance of counsel was watered down, and resulted in a per se violation of the Wade doctrine.

It is respectfully submitted that the opportunity for defense counsel to cross-examine the witness at the trial in regard to what transpired during the lineup is not sufficient to protect appellant's Constitutional rights. If it were, there would be no need for the United States Supreme Court to mandate the presence of counsel at a post-indictment lineup. Counsel must be present at all stages of the lineup because ". . . there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations." Wade, supra, at p. 230.

The main issue on appeal has been considered by several State and Federal Courts, with different results.

In People v. Williams, 478 P.2d 942 (Cal. Sup. Ct. 1971), the defense attorney was allowed to be present with the witness in the viewing room while the lineup was being conducted, but was barred from attending a conference between the witness and the prosecutor after the lineup was concluded. Although no suggestiveness at the lineup was alleged, the conviction was reversed on Sixth Amendment grounds.

The Court reasoned that the Wade-Gilbert rules were adopted for two reasons: to enable an accused to detect any unfairness in his confrontation with the witness, and to insure that he will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification.

"It is not the moment of viewing alone, but rather the whole procedure by which a suspect is identified that counsel must be able to effectively reconstruct at trial. . . If defense counsel is to be able to intelligently cross-examine the witness, he cannot be excluded from the moment of identification any more than he can be excluded from the lineup itself. To hold otherwise would be to reduce counsel's cross-examination to little more than shooting in the dark, for he would not be fully apprised of what occurred at the identification interview.

"In the instant case, counsel's presence at the lineup guaranteed that he would be able to detect any unfairness in the confrontation between appellant and the witness. However, the exclusion of counsel from the moment of actual identification frustrated the second purpose of Wade and Gilbert, namely, to safeguard against the inherent risks of suggestion which are present at that time. . . . We cannot reasonably suppose that the high court would announce a rule so susceptible of emasculation by avoidance." Williams, supra, at pp. 944-945.

It should be noted that in Williams, supra, unlike the instant case, defense counsel was allowed to be in the same room as the witness before and during the lineup. Therefore, the conviction in Williams was reversed on weaker Constitutional grounds than we have here.

In a very recent case (September 19, 1977), dealing with precisely the same facts as in Williams, the Supreme Court of Louisiana reached the same conclusion. State v. McGhee, 350 So.2d 370 (La. Sup. Ct. 1977). Once again, the defense attorney was allowed to be in the same room as the witness at the time of the lineup, but was barred from the post-lineup conference with the prosecutor. The Court held that the lineup as a stage of the proceedings against an accused is made up of several interdependent parts: the

suspect parade or assembly, the witness' viewing, the witness' reaction to the viewing, and the witness' verbal or written assertion of that reaction. "The confrontation which Wade concluded was a critical stage of the prosecution can hardly be said to have terminated with the witness' viewing. The witness' reaction is surely a part of the viewing, and its communication is surely a part of the lineup." McGhee, supra at p. 373.

Once again, the facts meriting reversal are stronger in the instant case than in McGhee, since here the defense attorney was not even allowed in the same room as the witness during the lineup, let alone being permitted to attend a post-lineup conference.

In United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970), the attorney was allowed to be present in the same room as the witness during the lineup, and was even permitted to attend the post-lineup conference. During the conference, an argument occurred between the defense attorney and the prosecutor, and the attorney was ordered out of the room for the remainder of the conference. On these facts, which are markedly different from the facts of the instant case, the Court held that there was no constitutional right to have an attorney present after the lineup was terminated and the witnesses were being interrogated outside of the presence of the suspects. The Court limited Wade "to the period during which an accused is within sight of a potential identification witness." Cunningham, supra, at p. 1274.

The same Court made a similar finding on slightly different facts. In United States v. Wilcox, 507 F.2d 364 (4th Cir. 1974), cert. den., 95 S.Ct. 1408 (1975), the attorney was present while the lineup was being set up, but was not allowed to attend an interview of the witness by the prosecutor that occurred after the lineup was concluded. However, after the prosecutor finished interviewing the witness, the Government made the witness available for an unlimited private interview by the defendant's attorney.

In the instant case, of course, no such meeting between the defense attorney and the witness was allowed, and in fact right after the lineup the parties went to the courtroom to continue the trial. Counsel was unaware of the results of the lineup and possible suggestiveness on the part of the Government, and was compelled to have his "interview" of the witness in the form of cross-examination in the presence of the jury.

In United States v. Banks, 485 F.2d 545 (5th Cir. 1973), cert. den., 416 U.S. 987 (1974), numerous witnesses were assembled in an auditorium to view a lineup. Defense counsel was permitted to be present during the lineup, but was not allowed to enter a side room where each witness was taken to give his or her response to the lineup.

The Court affirmed, holding that it was necessary for each witness to be taken to the side room separately so that the response of one witness would not prejudice the other

witnesses. The holding was limited to the peculiar facts of the case, particularly the viewing of the lineup by many witnesses. "Clandestine conferences may not be used for the purpose of evading the clear constitutional mandate of Wade and Gilbert." Banks, supra, at p. 549.

All of the above-cited Federal cases differ from the instant case in one very important respect: in the cited cases, the defendant's counsel was present in the same room as the witness when the lineup was being conducted, and could hear what was being said to the witness, and the reaction of the witness to the lineup. It was only the post-lineup conference that the attorney was prohibited from attending. In our case, the attorney was barred from being in the same room as the witness before, during, and after the actual lineup.

Doss v. United States, 431 F.2d 601 (9th Cir. 1970), seems to be the only case that supports the degree of deprivation of the right to counsel that we have in the instant case. Doss held that the defense attorney was not entitled to listen in on any remarks passed between the witness and the police officer during and immediately after the lineup. The Court felt that "the ordinary witness is capable of recalling and recounting conversations concerning the identity of a suspect." Doss, supra, at p. 604.

It is respectfully submitted that Doss undermines the constitutional guarantees enunciated in Wade and Gilbert and should not be followed by this honorable Court. To follow Doss

would water down the right of an accused to the assistance of counsel at a stage of the proceedings that is just as important as the trial itself.

POINT II

THE IN-COURT IDENTIFICATION BY THE WITNESS LAURA TRIA SHOULD HAVE BEEN SUPPRESSED BECAUSE OF THE UNCONSTITUTIONAL LINEUP AND THE LACK OF AN INDEPENDENT BASIS FOR THE IN-COURT IDENTIFICATION.

Under the doctrine of Wade and Gilbert, the deprivation of the right to counsel at a post-indictment lineup is a per se constitutional violation, and the fruits of such a lineup must be suppressed, irrespective of whether the lineup was otherwise suggestive or unfair.

In the instant case, because of the constitutional violation discussed in POINT I, the District Court committed error by allowing the witness Laura Tria testify before the jury that she had made a previous identification of the appellant.

Furthermore, because of the constitutional violation, the District Court committed error in permitting this witness to make an in-court identification of the appellant without first conducting a Wade hearing to determine whether the witness had an independent basis for the identification not based on the unconstitutional lineup.

The witness testified that she could see the bank robber's face for only six or seven seconds at the time of the robbery. Certainly there is a serious question as to whether her in-court identification was based on her observations at the time of the robbery, or instead was based on her

observations during the lineup.

To allow this witness to testify without the benefit of a Wade hearing violated the rights of the appellant, and in a case such as this where there was only one other witness who identified appellant positively as the bank robber, the error committed was substantial and warrants a reversal of appellant's conviction.

CONCLUSION

THE CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL; OR, IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A WADE HEARING CONCERNING THE LINEUP INVOLVING THE WITNESS LAURA TRIA.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Plaintiff ,

against

BLAIR WATSON,

Defendant .

AFFIDAVIT OF SERVICE
BY MAIL

Docket No. 77-1409

STATE OF NEW YORK, COUNTY OF

KINGS

ss.:

PETER J. FABRICANT
of counsel to
Defendant-Appellant
herein. That he is over, being duly sworn deposes and says that he is
the attorney for the above named

21 years of age, is not a party to the action and resides at

157 East 18th Street, New York, New York 10003
That on the 14th day of December, 19 77, he served the within Brief and Appendixupon David G. Trager attorney for the above named Appellee
by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Post Office—a
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that being then the post-office of the attorney serving the same; directed to the said attorney
for the Appellee at No. United States Courthouse, Brooklyn N. Y., that
being the address within the state designated by h e for that purpose, or the place where he
then kept an office, between which places there then was and now is a regular communication by mail.Sworn to before me, this 14th }
day of December, 19 77 }

Christine A. Scott

CHRISTINE A. SCOTT
Notary Public, State of New York
No. 24-1632500
Qualified in Kings County
Commission Expires March 30, 1979

Peter J. Fabricant

